

No. 654

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

**SIDMON McHIE and
HAMMOND REALTY COMPANY,**
a corporation,

Petitioners,

vs.

THE FIFTH AVENUE BANK OF NEW YORK,
Executor of the Last Will and Testament of
Isabel D. McHie,

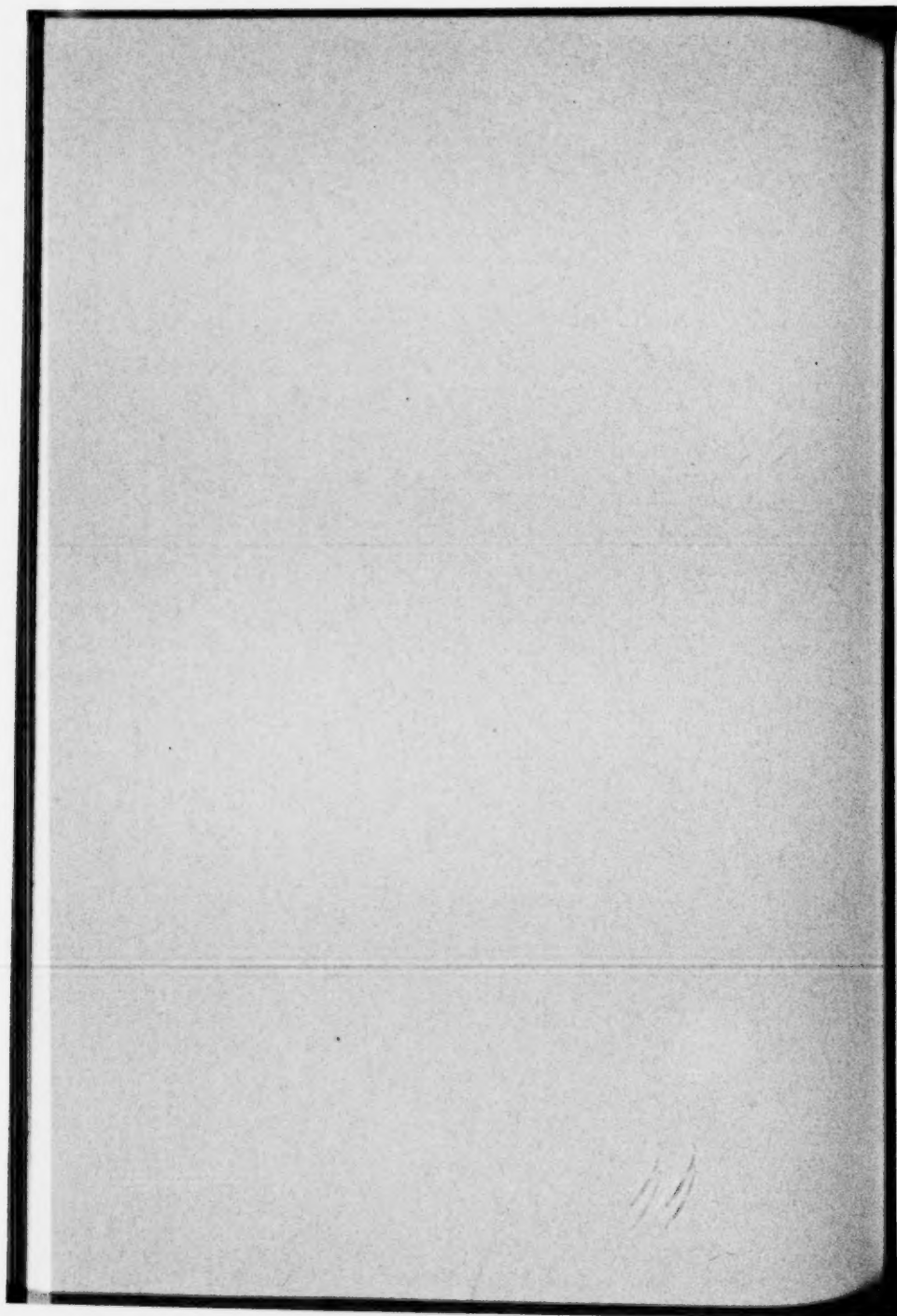
Respondent.

On Petition for Writ
of Certiorari to the
United States Circuit
Court of Appeals, for
the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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**BRIEF OF RESPONDENT IN OPPOSITION TO
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The Decision Below.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, is reported at 120 Fed. (2d) 933.

Questions Presented.

This case involves two simple clear-cut questions of contract and local law about which there is no conflict in any jurisdiction, state or federal. The questions are these: (a) Was the sixth covenant of the 1926 separation agreement (R. 30) between Sidmon McHie and his wife a separate and independent covenant? (b) Can a litigant collect benefits which are admittedly due him in any event under one portion of a decree, and appeal from other distinct and unrelated portions of said decree?

With regard to the first question the Circuit Court of Appeals concluded that the sixth covenant of the 1926 separation agreement which provides as follows:

“Sixth: It is agreed that the parties shall live apart and separate and shall not annoy or molest each other.”

was not the essence of the agreement but was a separate and independent covenant, and even if there was a breach of said covenant that did not abrogate and destroy the entire separation agreement (R. 174). The Circuit Court of Appeals also concluded that the essence of the 1926 agreement was the settlement of the extensive property rights of the parties; that the contract had been fully executed in every respect except as to the mutual obligation of the parties under the sixth covenant not to molest each other, and the covenant of Sidmon McHie to pay his wife One Thousand Dollars a month support, which he breached (R. 174).

With regard to the second question the Circuit Court of Appeals concluded that the stipulated facts show (R. 172) that the Hammond Realty Company, one of the defendants in the original action, never denied its liability to respondent, and respondent's collection of part of its judgment against Hammond Realty Company merely constituted receipt of that to which it was entitled in any event. The opinion also stated (R. 172) that the judgment against the Hammond Realty Company was not appealed from and thereby became final and conclusive (R. 172). The Circuit Court of Appeals concluded, therefore, that respondent could appeal from those portions of the District Court's decree which held that Sidmon McHie was the owner of his former wife's estate, and overruled the motion of petitioners to dismiss the appeal (R. 172). It should be noted that Hammond Realty Company has no

status here as a petitioner because it never appealed from the judgment against it.

The record in this case, as well as the opinion of the Circuit Court of Appeals, clearly demonstrate that the foregoing are the only questions now before this Court. Although petitioners devote a great portion of their brief to a lengthy discussion and argument of the principle of accord and satisfaction, it is apparent that that principle of law has no application to the present controversy.

Statement of the Case.

Petitioners have not stated the case in either their petition or brief so as to fairly present the matter involved.

Respondent, as executor of the last will and testament of Isabel D. McHie, brought a civil action (R. 1-8) in the District Court for the Northern District of Indiana, Hammond Division, to collect certain first mortgage bonds made by the Hammond Realty Company, an Indiana Corporation, the payment of which bonds was unconditionally guaranteed by Sidmon McHie. The Hammond Realty Company and Sidmon McHie were made defendants. Sidmon McHie filed a counterclaim in the action (R. 15, 16) asserting that he was entitled to the entire estate of his former wife on the theory that she had breached the sixth covenant of the 1926 separation agreement, that is, the covenant whereby the parties mutually agreed to live apart and separate and not to annoy or molest each other. The Hammond Realty Company offered no defense to the action and did not deny its liability (R. 172). The District Court rendered judgment in the sum of Ten Thousand Three Hundred Sixty-Five Dollars and forty-seven cents (\$10,365.47), plus costs of Twenty-Nine Dollars (\$29.00), for respondent against the Hammond Realty Company, and also rendered judgment sustaining the motion of Sidmon McHie for summary judgment, concluding that Sidmon

McHie was the equitable owner of the estate of his former wife (R. 122-127). Respondent appealed from that portion of the judgment which denied it judgment against Sidmon McHie as guarantor, and also from that portion of the judgment which decreed that Sidmon McHie was the equitable owner of the estate.

The McHies were married in 1909 and lived together as husband and wife until December 1925, when they separated (R. 26). On May 12, 1919, they signed an agreement for the execution of reciprocal wills (R. 17). On March 22, 1926, the McHies, then living separate and apart, executed a separation agreement (R. 26), specifically rescinding and cancelling the 1919 agreement (R. 29). The 1926 separation agreement, in great detail, provided for specific division of their respective property. Among other things, this agreement provided that it was the intention and desire of both parties that there be a complete, final and effective decision and settlement of their respective rights and holdings (R. 27); that one of the considerations of this contract was their mutual agreement to cancel and rescind the 1919 agreement for reciprocal wills (R. 29); that each party waived and released the property of the other, then owned or thereafter to be acquired, from any claim or title, contingent, reversionary or otherwise, and from any right of inheritance or descent (R. 29-30), and that it was the intention of both parties that during their respective lifetimes they could deal with their separate estates as therein described and defined as if they were unmarried and that upon the death of either, the property, both real and personal, then owned by him or her, should pass by his or her will under the law of descent as the case may be, free from any right of inheritance, title or claim in the other party and as if the parties at such time were unmarried (R. 30). In a separate cove-

nant (Sixth), at the end of the separation agreement (R. 30) the parties mutually agreed to live apart and separate and not to annoy or molest each other.

On November 11, 1933, Sidmon McHie filed an action for divorce in Indiana against his wife. In his amended complaint for divorce he alleged that the parties had entered into the 1926 separation agreement and stated that the purpose of the agreement was to obtain a final settlement and division of their property rights and also to provide monthly support for his wife (R. 65). He further alleged in his divorce complaint that he had fully performed his obligations under the 1926 separation agreement, except that he was in default in making his monthly support payments, and solemnly asserted that " * * he has always abided by and intends to continue to abide by those provisions of said separation agreement relative to the division of property therein set forth * * " (R. 66).

He was granted a divorce July 3, 1936 (R. 89-90), and the decree was affirmed by the Indiana Appellate Court on October 28, 1938 (R. 90-91). The Indiana Appellate Court decision is reported in *McHie v. McHie*, 16 N. E. (2d) 987. In its Conclusions of Law No. 3 the Indiana divorce court referred to the 1926 separation agreement and confirmed it as fully executed except with regard to the provision for monthly support:

"The decree should confirm to each party the absolute ownership of the property, real and personal, now held by him or her, whether acquired by virtue of said separation agreement of March 22nd, 1926, or otherwise. Transfers of property made pursuant to said agreement should be confirmed on the ground that they are executed transfers, regardless of whether said agreement was originally enforceable or not" (R. 88).

In its Final Judgment and Decree granting McHie his divorce, the Indiana court said:

“(2) That there is hereby confirmed to each party the absolute ownership of all the property, real and personal, now held by him or her, free from any right, title, interest or claim, legal or equitable, present or future, by the other thereto” (R. 89).

April 27, 1939, Isabel D. McHie died. Among the assets belonging to her estate were the bonds made by the Hammond Realty Company, guaranteed by her former husband. Several months after her death, that is on January 30, 1940, the attorneys for petitioners wrote to the attorney for the executor, admitted the obligation due to the estate, offered to make a payment on account and requested a six month extension on the balance (R. 58, 59).

On October 11, 1940, respondent filed its action against petitioners. Sidmon McHie filed a stipulation (R. 110, 111), admitting all the material allegations of the complaint. He also filed a counterclaim (R. 15-21) and asserted that under the 1919 agreement for reciprocal wills he was entitled to his former wife's entire estate. Respondent answered the counterclaim (R. 24-30), admitting the execution of the 1919 agreement, but asserting that said agreement had been cancelled and rescinded in its entirety by the 1926 separation agreement. Respondent's answer also asserted that the divorce decree was *res adjudicata* with regard to the property rights of the parties or their privies.

The District Court found that the 1926 separation agreement was completely nullified because Mrs. McHie had annoyed and molested her husband; that the 1919 agreement for reciprocal wills was thereby automatically

revived, and concluded that Sidmon McHie thus became the owner of the estate which his former wife by her will (R. 108, 109) left to her parents and The Seeing Eye, Incorporated, a charitable institution which trains dogs for the blind. The District Court's Findings of Fact, Conclusions of Law, and Final Judgment and Decree are found at (R. 119-127).

Petitioners do not correctly state the facts when they say that the consideration for the 1926 agreement was "her" covenant to "cease annoying, molesting and bedeviling him for the rest of her life." The fact is that both parties agreed not to annoy or molest each other (R. 30). Nor are petitioners correct when they state that "he" agreed to give up "his" right to "her" property under the 1919 agreement for reciprocal wills. The fact is that both parties gave up their respective rights in each other's property (R. 29, 30).

Petitioners are also incorrect when they state that the Circuit Court of Appeals expressly excluded the divorce decree as a factor in its decision. The Circuit Court of Appeals simply found it unnecessary to rely upon the divorce decree. There is nothing in the opinion of the Circuit Court of Appeals which suggests that the divorce decree was not material or pertinent to the issues before the court. The court merely concluded that the independent covenant doctrine was ample to require a reversal. The effectiveness of its judgment would not be augmented by adding further reasons to support it. Such procedure is customarily followed by reviewing courts.

Summary of Argument.

I. Petitioners do not come within the class of cases referred to in Rule 38(5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

II. The decision of the Circuit Court of Appeals in construing the sixth covenant of the separation agreement as separate and independent is in strict accord with all established authorities, local and federal. The cases cited by petitioners refer to the doctrine of accord and satisfaction and have no application to a covenant "not to molest or annoy" in an executed separation agreement which provides for division of extensive property rights of the parties.

III. The decision of the Circuit Court of Appeals in overruling the motion to dismiss the appeal was based on the established law of the State of Indiana. Its judgment is also in accord with the decisions of this Court.

IV. The Circuit Court of Appeals could also have reached the same result by holding that the divorce decree was *res adjudicata* in that it permanently and finally settled and adjudicated the property rights of the McHies.

ARGUMENT.**I.**

Petitioners do not come within the class of cases referred to in Rule 38(5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

This case does not come within the class of cases referred to in Rule 38(5) of this Court. The questions presented here involve contract and local law. Hence, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, as interpreted by this Court in *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, petitioners are required to show the existence of a real conflict between the decision of the Circuit Court of Appeals and local decisions in Indiana. In *Ruhlin v. New York Life Ins. Co.*, *supra*, at page 206, this Court said: "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." And at the same page this Court continued: "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' " There is no conflict between the decision of the Circuit Court of Appeals and applicable local decisions on the principle of separate and independent covenants. Petitioners have not cited a single case, Indiana, federal or otherwise, which, on similar facts, is contrary to the judgment of the Circuit Court of Appeals in this case. Their authorities which refer to the doctrine of accord and satisfaction are clearly inapplicable here.

As a second reason for obtaining a writ under Rule 38(5), petitioners argue that the opinion of the Circuit Court of Appeals is self-contradictory on its face and

thereby unsettles the contract law on independent covenants. They say that this resulted because the Circuit Court of Appeals stated (R. 174) that Sidmon McHie's failure to make his required monthly support payments was doubtless the reason why Mrs. McHie exhibited her annoyance to and molested her husband. The opinion indicates clearly that the language referred to was simply an observation made by the court and did not constitute the reason for the decision.

As a third reason for invoking the jurisdiction of this Court, petitioners urge that the decision of the Circuit Court of Appeals overruling their motion to dismiss the appeal so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision. In overruling the motion, the Circuit Court of Appeals relied on the following Indiana cases: *State ex rel. Jackson v. Middleton*, 215 Ind. 219, 224, and *City of Indianapolis v. Stutz Motor Car Co.*, 98 Ind. App. 211. No contrary or conflicting authority, local or federal, is cited by petitioners.

We submit therefore that this case does not come within the class of cases referred to in Rule 38(5), and the petition for a writ should be denied.

II.

The decision of the Circuit Court of Appeals in construing the sixth covenant of the separation agreement as separate and independent, is in strict accord with all established authorities, local and federal. The cases cited by petitioners refer to the doctrine of accord and satisfaction and have no application to a covenant "not to molest or annoy" in an executed separation agreement which provides for division of extensive property rights of the parties.

In its opinion (R. 172) the Circuit Court of Appeals pointed out that the 1926 separation agreement (R. 26-30) covered five pages in the record, and the court concluded that the essence of the contract was the settlement of the extensive property rights of the parties. The court also pointed out (R. 174) that this contract had been executed in every respect except as to the mutual obligations of the parties under the sixth covenant not to molest each other and except as to the covenant of Sidmon McHie to pay monthly support to his wife, which covenant the court found he breached. The court concluded, therefore, that it was apparent from an examination of the separation agreement that the sixth covenant was separate and independent and did not constitute the essence of the contract (R. 174). The true considerations for the execution of the 1926 separation agreement were as follows: (a) Division of the extensive property between the parties; (b) the desire of Sidmon McHie to be relieved of his legal duty to support his wife; (c) the desire of both parties to have the other relinquish any right that he or she might have in the property of the other; (d) their mutual desire to live apart and separate (R. 26-30). As a matter of fact, Sidmon McHie himself construed the chief purpose of the 1926 agreement to be a division of

their respective property rights. He so stated in his amended complaint for divorce (R. 65).

In determining that the sixth covenant was separate and independent, the Circuit Court of Appeals relied on *Hughes v. Burke*, 167 Md. 472, 175 A. 335, 337, and *Sabbarese v. Sabbarese*, 104 N. J. Eq. 600, 146 A. 592. Other cases in accord are:

Stern v. Stern, 112 N. J. Eq. 8, 10.

Fearan v. Earl of Aylesford, 14 Q. B. Div. 792.

Moller v. Moller, 188 A. 505, 507.

Petitioners have not cited a single Indiana or federal case, on similar facts, in conflict with any of the foregoing authorities.

Petitioners urge that the Circuit Court of Appeals applied the "wrong field" of contract law in construing the sixth covenant. They claim that the doctrine of independent covenants does not apply to separation agreements, but pertains only to commercial contracts. Petitioners are obviously in error because the cases cited by the Circuit Court of Appeals and the other cases cited above all pertain to separation agreements, and in each instance the court applied the accepted doctrine of separate and independent covenants.

Petitioners cite no cases in conflict with the decision of the Circuit Court of Appeals, which embrace extensive property provisions in separation agreements which have been *fully executed*. Instead, they elected to argue the law of accord and satisfaction. Those cases have no bearing in the instant case, and are of no assistance to them in this Court.

III.

The decision of the Circuit Court of Appeals in overruling the motion to dismiss the appeal was based on the established law of the State of Indiana. Its judgment is also in accord with the decisions of this Court.

The District Court's decree (R. 122-127) provided as follows:

(a) Sidmon McHie was accorded all of the rights which he had under the May 1919 agreement for reciprocal wills.

(b) Sidmon McHie was declared to be the owner of the estate left by his former wife.

(c) Respondent, executor of the estate of Mrs. McHie, was given a judgment against Hammond Realty Company, one of the defendants, for \$10,365.47, plus costs.

(d) Respondent was denied judgment against Sidmon McHie as guarantor.

Respondent collected part of its judgment against the Hammond Realty Company. It appealed from the other portions of the District Court's decree which, in substance, held that Sidmon McHie was the owner of the entire estate left by his former wife. The Circuit Court of Appeals correctly concluded that respondent, by collecting part of its judgment against Hammond Realty Company, did not waive its right to appeal from the remaining portions of the decree. The Circuit Court of Appeals pointed out that the Hammond Realty Company never denied its obligation and did not appeal from the judgment against it, so that said judgment against the Hammond Realty Company became final and conclusive (R. 172). In its opinion (R. 171), the Circuit Court of Appeals relied on the following Indiana cases which hold

that an appellant by accepting that to which he is entitled in any event does not thereby waive his right to appeal from other distinct and unrelated portions of a decree:

State ex rel. Jackson v. Middleton, 215 Ind. 219, 224, 19 N. E. (2d) 470, 472.

City of Indianapolis v. Stutz Motor Car Co., 94 Ind. App. 211, 180 N. E. 497.

This Court has on frequent occasions affirmed the same rule:

Gilfillan v. McKee, 159 U. S. 303, 311, 312.

Embry v. Palmer, 107 U. S. 3, 8.

Reynes v. Dumont, 130 U. S. 354, 394.

United States v. Dashiell, 3 Wall. 688, 702.

It is apparent, therefore, that both on the basis of established Indiana authority, as well as on the established authority of this Court, that the Circuit Court of Appeals was correct when it overruled the motion to dismiss respondent's appeal.

IV.

The Circuit Court of Appeals could also have reached the same result by holding that the divorce decree was res adjudicata in that it permanently and finally settled and adjudicated the property rights of the McHies.

The Findings of Fact (No. 6) (R. 87), Conclusions of Law (R. 88-89) and Final Judgment and Decree (R. 89-90) in the McHie divorce proceeding, demonstrate conclusively that the separation agreement of 1926 was considered and approved by the Indiana divorce court, and that said court definitely and conclusively adjudicated the respective property rights of the McHies. In its Conclusion No. 3 (R. 88), the Indiana divorce court determined:

"The decree should confirm to each party the absolute ownership of the property, real and personal, now held by him or her, whether acquired by virtue of

said separation agreement of March 22nd, 1926, or otherwise. Transfers of property made pursuant to said agreement should be confirmed on the ground that they are executed transfers, regardless of whether said agreement was originally enforceable or not."

In its Final Judgment and Decree (R. 89) the Indiana divorce court decreed:

"(2) That there is hereby confirmed to each party the absolute ownership of all the property, real and personal, now held by him or her, free from any right, title, interest or claim, legal or equitable, present or future, by the other thereto."

And the Indiana divorce court concluded its Final Judgment and Decree (R. 90) as follows:

"* * * and that any other financial obligations, rights or claims of any kind which might be asserted by either party against the other arising from anything occurring prior to this time are hereby terminated absolutely, except only said guarantee on said Hieland Golf Course, Inc., bonds."

It is uncontroverted that in a divorce proceeding in Indiana the court has complete jurisdiction to determine property and separation agreements entered into between husband and wife prior to divorce, and the court having done so, the adjudication and construction is *res adjudicata* for all future purposes between the divorced parties and their privies.

Walker v. Walker, 150 Ind. 317, 324, 325, 327, 328.

McHie v. McHie, 106 Ind. App. 152, 177.

Wise v. Wise, 67 Ind. App. 647, 653, 654.

Blagetz v. Blagetz, 37 N. E. (2d) 318, 320.

Clearly, therefore, on the basis of the authorities cited above, the Circuit Court of Appeals could have reached the same result by holding that the divorce decree was *res adjudicata* in that it permanently and finally settled

and adjudicated the property rights of the McHies. The court concluded, however, that the independent covenant theory was ample for reversal.

CONCLUSION.

The decision of the Circuit Court of Appeals is clearly correct. Its decision is in accord with all of the decided cases which construe covenants not to "annoy or molest" contained in separation agreements similar to the 1926 separation agreement in this case. Petitioners have not cited a single case, Indiana, federal or otherwise, to the contrary. The decision of the Circuit Court of Appeals in overruling petitioners' motion to dismiss the appeal is also in accord with Indiana law, as well as with the decisions of this Court and intermediate federal courts. Petitioners have not cited a case to the contrary. The Circuit Court of Appeals, in its decision in this case, did not depart from the accepted and usual course of judicial proceedings. Thus, no question is presented to this Court which justifies the issuance of a writ of certiorari under Rule 38(5), or any of the other rules governing the granting of such writs. The petition therefore should be denied.

Respectfully submitted,

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